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IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

No. 617

JEFFERSON WAREHOUSE AND COLD STORAGE COMPANY AND W. C. HUDLOW, JR., *Appellants*,

v.

UNITED STATES OF AMERICA, *Appellee*.

On Appeal From United States District Court for the Northern District of Alabama—Southern Division

REPLY OF APPELLANTS TO MOTION OF APPELLEE TO AFFIRM

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Come now appellants, Jefferson Warehouse and Cold Storage Company and W. C. Hudlow, Jr., and pursuant to Rules 16 and 40 of the Revised Rules of this Court, respectfully file this reply to the motion of appellee, United States of America, to affirm the opinion and decree of the United States District Court

for the Northern District of Alabama, Southern Division, entered June 8, 1962, reported at 205 F. Supp. 640, as amended on July 31, 1962 (not reported).

The Court's attention is directed to the Jurisdictional Statement heretofore filed by these appellants for a concise statement of the grounds on which this Court's jurisdiction is invoked, for a statement of the statutes involved, for a statement of the questions presented for review, and for a statement of the case.

JURISDICTION

The United States does not question this Court's jurisdiction to consider the appeals of Jefferson Warehouse and Cold Storage Company and W. C. Hudlow, Jr. Apparently, it likewise does not question the position of appellants that the questions involved are substantial since no such claim is made.

Rather, the United States takes the position that the District Court acted reasonably within its equitable jurisdiction on all matters and its action should be affirmed. Appellants maintain that the action of the District Court was so clearly erroneous as to require correction by this Court.

THE OPINION BELOW IS CLEARLY ERRONEOUS

This Court Has Unlimited Right to Review

Rule 52 (a) relative to findings by the trial court states:

> "Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses."

A finding is "clearly erroneous" when although there is evidence to support it, the reviewing Court on the

entire evidence is left with the definite and firm conviction that a mistake has been committed. *U. S. v. U. S. Gypsum Company*, 333 U.S. 364, 68 S. Ct. 525, 92 L. Ed. 746. If the Court's opinion is based upon uncontradicted testimony, documentary evidence or deposition evidence, it is subject to free review unaffected by presumptions which ordinarily accompany findings on controverted issues. *Carter Oil Company v. McQuigg*, 112 F. 2d 275. As Judge Frank said in *Orvis, et al. v. Higgins*, 180 F. 2d 537, *cert. den'd* 340 U.S. 810, 71 S. Ct. 37, 95 L. Ed. 959, the latitude of the reviewing court depends on the type of evidence since the rule itself refers to "the opportunity . . . to judge of the credibility of the witnesses"—which suggests that where nondemeanor testimony is involved the trial judge has no preferred status. Indeed, this seems to be inherent in appellate court power anyway.

Appellants herein respectfully submit that this Court is possessed with authority for free review of this cause since the basic issues of fact relied upon by the court below are uncontradicted and also since its decision was based in large part upon documentary evidence including a prior decision of the Interstate Commerce Commission. Appellants' real quarrel with the court below is its misapplication of the law to the facts adduced.

The Uncontradicted Facts

1. On July 1, 1958, Thomas N. Nelson and Company, a corporation, occupying Building No. 2 of the Birmingham Food Terminal owed back rent to the Southern Railway Company in the amount of $176,410.04, was hopelessly insolvent and unable to continue in business.

2. On July 1, 1958, Birmingham Terminal Cold Storage Company, a corporation, occupying Building

No. 8 of the Birmingham Food Terminal owed back rent to Southern Railway in the amount of $61,239.88, and was likewise in debt, being unable to pay its arrearage and unable to continue its operation.

3. W. C. Hudlow, Jr., President and sole owner of Chattanooga Warehouse and Cold Storage Company of Chattanooga, Tennessee, was contacted by representatives of the Southern Railway Company requesting that he form a corporation for the purpose of conducting a warehouse business in Buildings Nos. 2 and 8 of the Birmingham Food Terminal owned by Southern.

4. As a result of an arms length bargaining transaction, Jefferson Warehouse and Cold Storage Company entered into an agreement with Southern Railway on a month-to-month lease requiring it to pay rents based upon space utilized by it during the month.

5. Such a contract is not unusual nor uncommon in the warehouse business and is lawful in every respect.[1]

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[1] Since the court below disregarded this fact, and since it is of paramount importance, the sole evidence of record is quoted as follows:

"Q. (By Mr. Elliott) Now from your connection with National Warehousing organizations and your knowledge of the customs and practices in the industry over the country, would you tell us whether or not the month-to-month payment for occupancy basis is an unusual arrangement in the industry?

(By Mr. Hudlow) It is not.

Mr. Vann: I object.

Court: I overrule the objection.

Q. Is there any other comparable arrangement that is frequently used by warehousemen for computing rents, that is the owners of the building and the warehousemen?

A. Yes, sir, I know of two instances where the owners or builders are leasing warehouse buildings to public warehouse

6. From the beginning of its occupancy of Buildings 2 and 8, in 1958 to the trial of the cause below (April 23, 1962) Jefferson Warehouse had paid to Southern Railway all rent due said lessor under the terms of the lease agreement *including increased rents subsequent to September 1, 1960,* computed by Southern, in compliance with the Interstate Commerce Commission order.

7. Jefferson Warehouse and Cold Storage Company and Southern Bonded Warehouse[2] were the only ten-

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operators on a percentage of the revenue from the storage", (R. 626-627).

In qualifying Mr. Hudlow to testify as an expert as quoted above, the record reflects that he has been affiliated with the National Association of Refrigerated Warehouses, for which he was a Director for four years; he has been Chairman of the Southeastern Chapter of the N.A.R.W. which he helped organize in 1951; he is Past President of the Southeastern Warehousemen and Manufacturers Association; Past President of the American Association of Warehouses, which is a sales organization representing approximately 80 warehouses throughout the United States; has served in various capacities for these industry groups on advisory boards from time to time and has also served as a Director of the Refrigerated Research Division, which represents the Cold Storage Industry in research and development of new storage techniques and protection of goods under cold storage. (R. 616-617).

Also, the Court should consider that the party most concerned with the outcome of the litigation in question, Mr. Jack G. Shaw, Jr., owner of Shaw Warehouse Company, complainant in the original Interstate Commerce Commission action and intervener in the cause below, whose complaint in intervention brought Jefferson Warehouse and Cold Storage Company and W. C. Hudlow, Jr., into this action, testified in rebuttal. (R. 721). Yet, Mr. Shaw (nor any other party) in no way contradicted the testimony of W. C. Hudlow, Jr. to the effect that the contract between the Jefferson Warehouse and Southern Railway was not unusual nor uncommon.

[2] The cause as to Southern Bonded Warehouse was dismissed below since it had vacated the premises prior to April 23, 1962.

ants who paid all of the rentals incurred to the date of the trial below.

The Court Below Erroneously Rewrote a Valid and Legally Enforceable Contract

The court below entered judgment in favor of Southern Railway against Jefferson Warehouse Company and W. C. Hudlow, Jr. in the amount of $29,758.41. This purported to be the difference between the rentals actually paid by appellants and the amount which "Southern should have charged and collected and Jefferson Company and Hudlow should have paid from September 1, 1960 through April 30, 1962".

It is clear that the court below simply disregarded the lease agreement between Southern and Jefferson because it was based upon space *actually occupied*. The court had no legal nor equitable right to do this.

The only evidence of record shows that such a contract is in no way unusual nor uncommon in the warehouse business. See Footnote 1, *supra*. A similar type contract, also utilized by warehousemen, provides for the payment of rentals based upon a percentage of revenue derived from operations. All of this evidence is completely uncontradicted.

Furthermore, the Interstate Commerce Commission in *Shaw Warehouse Company* v. *Southern Railway Company, et al.*, 308 I.C.C. 609, (which the court below accepted without question) in no way declared such a contract to be illegal, unenforceable or in any way to form the basis for unjust discrimination, favoritism or invidious rebates as stated by the District Court. The District Court's action finds no basis in fact, law, or equity and therefore must be reversed by this court.

The District Court's opinion makes it clear that it is relieving all tenants other than appellants from the burden of paying to the Southern Railway Company rents as determined by the Interstate Commerce Commission order until and beginning May 1, 1962. Such fact is true even though all tenants other than Jefferson Warehouse were parties to the original plan as conceived and effectuated by Southern Railway. All were parties to the discussions and negotiations prior to the signing of the "round-robin agreement". All were signers of the "round-robin agreement". All were parties to the action before the Interstate Commerce Commission to determine the proper rental base, allowing them ample opportunity to be heard. All were stockholders in the Birmingham Food Terminal, Inc. and, as such, were plaintiffs in Civil Action No. 9080 entitled *Birmingham Food Terminal, Inc., et al.* v. *Southern Railway Company, et al.* And all were original defendants in Civil Action No. 9155 entitled *United States of America* v. *Southern Railway Company, et al.* In addition, some even refused to pay the rents agreed upon in their original lease agreements with Southern Railway. From and after September 1, 1960, *none* of the tenants other than Jefferson Warehouse made any attempt to comply with the Interstate Commerce Commission order to pay the increased rents. Yet all tenants, except Jefferson Warehouse, were exonerated from the payment of said rents from the inception of their occupancy of the Birmingham Food Terminal to May 1, 1962.

On the other hand, there is W. C. Hudlow, Jr., President and sole stock holder of Chattanooga Warehouse and Cold Storage Company in Chattanooga, Tennessee, who in the summer of 1958 had no knowl-

edge of the Birmingham Food Terminal, the "round-robin agreement", any discussion or negotiation leading to its execution, or any knowledge of a proceeding before the Interstate Commerce Commission concerning same. He was contacted by the Southern Railway Company, who explained it had two tenants occupying Buildings 2 and 8 in the Birmingham Food Terminal that owed considerable sums of money and were unable to continue operating. Southern requested Hudlow to come to its aid and conduct warehouse operations in Birmingham in the aforesaid buildings. Hudlow, a reasonably prudent business man, verified the facts explained by Southern. He also discovered that there was a proceeding before the Interstate Commerce Commission involving a dispute over the level of rentals charged by Southern. In discussing this with Southern, he was assured by it that the "round-robin agreement" and the rents charged thereunder had the approval of the Interstate Commerce Commission. Armed with this assurance, Hudlow negotiated with the Southern Railway Company, a legitimate and lawful contract (later assigned to Jefferson Warehouse) to conduct operations in the two buildings in question. It was further understood that Hudlow would form a corporation which would conduct the warehouse operations. This was done and business was conducted by Jefferson Warehouse and rents paid on the agreed basis until September 1, 1960. Unfortunately for Jefferson, the Interstate Commerce Commission order required an increase of rent on the buildings occupied by it, and although such increased rent was based upon items of cost of no benefit or value to Jefferson, it nevertheless paid all increased rentals from and after that date to the date of the trial below.

Neither Jefferson Warehouse nor W. C. Hudlow has ever been a party to Civil Action 9080. Neither were original defendants in Action No. 9455 and were in no way involved in this litigation until ordered to defend itself by the complaint in intervention filed on the behalf of Birmingham Ice and Cold Storage Company and Shaw Warehouse Company, which was allowed on June 2, 1961.

Appellants sincerely urge that by weighing the equities on behalf of the original tenants on one hand, and, on the other, appellants, the action of the trial court was clearly erroneous.

The United States in its motion to affirm maintains that this action by the trial court was appropriate in the circumstances for the reason assigned by the Court. The crux of the Court's opinion seems to be that somehow Hudlow and Jefferson have unlawfully devised a method to violate the law. The Court places Hudlow in the position of a culprit for some unknown reason. The Court said "into this atmosphere entered Hudlow." Rather than stating the fact that the *Southern Railway went to Hudlow* with its problem. And again, the Court said that various matters "granted by Southern to Jefferson Company were solicited by Hudlow personally and were availed of by his wholly owned corporation". Hudlow *did not* solicit Southern Railway for anything. The Southern Railway solicited Hudlow for his help. Thereafter, the two negotiated at arms length the lease agreement which is lawful in every respect.

This presents the real ironical part in this cause, namely, if there has been any scheming or concession devices created by anyone, it has been done by the Southern Railway Company. Yet, the Southern Rail-

way Company by the decree stands to benefit more than any other party. The action of the court below in blaming Hudlow and Jefferson Warehouse Company for the wrongdoing conceived, fostered, and carried out by the Southern Railway Company, and yet allowing the latter to benefit thereby, is obviously erroneous.

It is submitted that there is no basis in the evidence in this record to discriminate against appellants in the payment of rents as was done by the District Court. For the same reason, there is no basis to disregard the corporate entity of Jefferson Warehouse and Cold Storage Company.

It follows that W. C. Hudlow, Jr. should not be held personally responsible for the obligations of Jefferson Warehouse and Cold Storage Company. He will, necessarily, be directly affected as the sole stockholder of said corporation, both in the amount of the original capital subscribed to, as well as the substantial loans he has made to, and personally endorsed for, the corporation. As an individual, W. C. Hudlow, Jr. is not and never has been either a shipper or receiver of freight, as defined in the Elkins Act. The record below is void of any evidence showing that he ever has been such a shipper or receiver of freight.

The United States indicates that there is no claim that different treatment was given persons in the same situation. It further states that it cannot be seriously urged that the classification established by the court—*viz.*, those tenants whose rental agreements antedated the Commission inquiry into the railroad's practices and those whose arrangements did not—were arbitrary. To the contrary, appellants do claim that different treatment was accorded to persons in the same situ-

ation and do seriously contend that the classifications established by the court were arbitrary. Jefferson Warehouse was not the only tenant whose lease agreement was signed after the Commission inquiry into the railroad practices. Southern Bonded Warehouse was also in this situation. Yet, the court below dismissed the cause as to Southern Bonded Warehouse. Thus, different treatment was accorded Southern Bonded Warehouse and appellants. The only distinction, if any, between Southern Bonded and appellants is that the rent of the former was based upon a total amount of space per month, whereas that of the latter was based upon space actually occupied. As heretofore argued, both contracts are lawful in every respect and therefore could not possibly form the basis of the arbitrary difference of classification established by the court below.

The District Court Erred in Including Certain Costs in the Rental Basis Chargeable to Appellants

The District Court erred in not excluding from the base upon which rental was ordered to be paid early completion costs, costs incurred to correct defectively installed refrigeration equipment, and costs of unused engineering plans, all incurred for the benefit of previous occupants of Buildings Nos. 2 and 8, and from which appellants received no benefit. It is undisputed that appellants did not, in fact, receive any benefits from the costs enumerated. The court below made reference to this contention by appellants and thereafter cast it aside in the following terse manner:

> "In view of the circumstances, adverted to above, surrounding the transition of the going businesses of previous tenants to Jefferson, the court holds

that such cost items are necessarily includable in the rent base".

The circumstances adverted to above are the same as just discussed whereby the court disregarded the corporate entity of the Jefferson Warehouse and Cold Storage Company. Appellants see no need to repeat such argument herein. Suffice is to say the court's error in transposing Southern Railway's wrongdoing into that of Hudlow and Jefferson Warehouse and Cold Storage Company has been carried forward by including various cost items in the rental basis of Buildings Nos. 2 and 8. Again, Southern benefits from its own wrongdoing.

In addition, the inconsistency of the District Court's position is manifest by the fact that it would include early completion costs, etc., and thereby hold appellants responsible for certain debts of the prior occupants of the building in question, yet, in no other way would it hold them responsible for any other debts or obligations of the preceding occupants. It is uncontradicted in this record that neither W. C. Hudlow, Jr., individually, nor Jefferson Warehouse and Cold Storage Company, as a corporation, assumed any debt or obligation of Thomas N. Nelson and Company or Birmingham Terminal Cold Storage Company. Indeed, it defies belief that any reasonably prudent business man or corporation would assume debts in excess of $230,000.00, without receiving at least equal benefit in some other manner.

CONCLUSION

For the foregoing reasons, appellants respectfully urge that to the end that justice may be done, this Court must note probable jurisdiction on the appeal taken by Jefferson Warehouse and Cold Storage Company and W. C. Hudlow, Jr. The questions involved are substantial and this is not disputed by the motion to affirm. The action of the District Court was clearly erroneous as pointed out in this reply and therefore requires that the motion to affirm be denied. The matters involved in this appeal are so substantial to all shippers and receivers of freight, warehousemen, and carriers, that it requires the plenary consideration of this Court. Upon such consideration, this Court should find that an individual, having no closer connection with commerce than to be the president and sole stockholder of a corporation engaged in a legitimate warehouse business, is not to be considered a shipper or receiver of freight as defined in the Elkins Act. It should further find that under the circumstances of this case substantial justice and equity require that appellants should not be onerated with the payment of increased rentals while other tenants having less equitable right must not similarly pay. It should find that any individual or company not a party to the original "round robin" agreement involved in these proceedings has the right to negotiate a lease agreement at arms length with the Southern Railway Company. In doing so, such person or corporation should not be compelled to pay rent on matters such as early completion costs, costs incurred to correct defectively installed refrigerating equipment, or other latent defect costs. It should also find that a warehouseman can legally contract with the owner of a warehouse to rent

space on a space occupied basis. And, it should find, based upon the evidence in this record, that Jefferson Warehouse and Cold Storage Company is a corporate entity created for a legitimate business purpose, and its corporate identity should be recognized separate and apart from its officers, directors, and stockholders in their individual capacity.

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